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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1747

W. T. MAYFIELD SONS TRUCKING CO.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, W.T. Mayfield Sons Trucking Co., respectfully prays that a writ of certiorari issue to review the judgment and *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 9, 1975 affirming an order of the Interstate Commerce Commission.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals dated December 9, 1975, appears at Appendix A, *infra*, p. 2a, and is reported at 525 F.2d 692. The report of the Interstate Commerce Commission, reported at 120 M.C.C. 46, appears at Appendix B, *infra*, pp. 1b to 23b. The order of the Interstate Commerce Commission which accompanied its report appears at page 25b, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 9, 1975. See p. 2a, *infra*. A timely petition for rehearing was denied on January 12, 1976. See p. 1a, *infra*. By Order of Mr. Justice Powell, dated March 29, 1976, the time for filing this petition for certiorari was extended to June 1, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a summary affirmance of an Interstate Commerce Commission order, entered by a Court of Appeals without written opinion or oral argument, should be remanded to that court for explication of the reasons for such affirmance, where

(a) The summary affirmance may have been based on any one of several important points in issue, some of which give rise to certiorari signficance, and

(b) It is impossible for this Court or the litigants to determine the actual basis of the affirmance and thus whether there is a question worthy of review on certiorari.

STATUTE AND LOCAL COURT RULES INVOLVED

Section 212(a), Interstate Commerce Act, 49 U.S.C. § 312(a):

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the

Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Local Rules 18 and 21 of the United States Court of Appeals for the Fifth Circuit:

Rule 18. Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.
Added Dec. 24, 1968.

Rule 21. Affirmance Without Opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.
Added July 1, 1970.

STATEMENT OF THE CASE

Petitioner is a motor common carrier of property operating in interstate commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission (Commission). One of these certificates authorizes Petitioner to transport "contractors' machinery and equipment, *not limited to such commodities as are intended solely for use by contractors*" (emphasis added). Relying upon the express language of that certificate, Petitioner has transported shipments of machinery and equipment of the type used by contractors irrespective of whether the

intended user of any particular shipment is a contractor.

The Commission, ignoring the express language of the certificate and purportedly in reliance upon matters antedating its issuance, "interpreted" the lawful scope of Petitioner's service thereunder as limited to: (a) the transportation of machinery and equipment intended for use by contractors; and (b) the transportation of machinery and equipment of the type used by contractors "to persons who are not contractors *when engaged in construction activities equivalent to those which a contractor performs*".[1] The effect of the Commission's interpretation narrows Petitioner's operating authority as follows:[2]

[1] Appendix B, p. 13b, *infra*, 120 M.C.C. at 53-54 (emphasis in original). The Commission's "interpretation" includes the so-called "rule of reasonableness" under which any shipment of machinery and equipment may be transported when the shipment is known or ascertained with reasonable certainty to be intended for use by a contractor or on a construction project.

[2] The term "construction machinery and equipment", as used by the Commission in its certificates, means machinery and equipment intended for use in construction activities, *Pierce Auto Freight Lines, Inc. v. Converse*, 54 M.C.C. 447, at 452-53 (1952). Thus, the Commission's "interpretation" was the same as rewriting Petitioner's certificate to read: "contractors' machinery and equipment and construction machinery and equipment." Indeed, the term "contractors" as used in Commission certificates "is not limited to oilfield contractors, heavy construction contractors, building construction contractors, highway contractors, or to contractors of any other type". *C & H Transportation Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586, at 587-88 (1954).

Language in Certificate	*Certificate as Interpreted*
contractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors	contractors' machinery and equipment limited to such commodities as are intended for use by contractors or by persons who are not contractors when engaged in construction activities equivalent to those which a contractor performs

The Commission "interpretation" took place in the context of an investigation proceeding instituted on the Commission's own motion under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. § 304(c).[3] The Commission's Bureau of Enforcement (Bureau) was the only other party in the investigation proceeding. In lieu of an oral hearing Petitioner and the Bureau entered into a stipulation of facts concerning Petitioner, the language of the certificates in question, and specific shipments transported by Petitioner and claimed by it to be within the scope of the authority in question.[4] Respecting the shipments in question under the certificate here involved, it was stipulated that "all of the commodities transported could be used by contractors in the course of their business and are moved to and from jobsites. . . ."[5]

[3] *Sub nom. W. T. Mayfield Sons Trucking Co., Inc. - Investigation and Revocation of Certificates*, Docket No. MC-C-7566.

[4] The investigation encompassed other shipments and another certificate not involved at any stage in court review of the Commission's action.

[5] The significance of the language concerning movement "to and from jobsites" is to distinguish the articles from "materials" and "supplies" which, in Commission parlance, are, respectively, incorporated into, and consumed at, the jobsite.

The Commission in its report and order dated June 17, 1974 made no effort to interpret the certificate in question based upon its language.[6] Instead, the Commission stated:

> "[Petitioner's] certificate is, to our knowledge, unique, and cannot properly be interpreted without recourse to the 14 years of litigation, four Commission reports, and two court decisions that preceded its issuance."[7]

Without reopening any of the proceedings leading to the issuance of the certificate, the Commission referred to the decisions rendered in those proceedings and

[6] Throughout the course of the proceedings before the Commission and the lower court Petitioner has urged that the language of the certificate in question is clear and unambiguous and must, accordingly, be construed from its terms. Appendix B, p. 4b, *infra*.

[7] Appendix B, p. 7b, *infra*, 120 M.C.C., at 50. The litigation to which reference was made concerned: (a) interpretation of a certificate previously held by Petitioner reading merely "contractors machinery and equipment"; and (b) an application seeking issuance of a new certificate to Petitioner under Section 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a), enabling Petitioner to transport machinery and equipment found not within the scope of "contractors' machinery and equipment". The Commission's action in interpreting that certificate was twice set aside by a statutory three-judge United States District Court for the Northern District of Georgia on review under the procedures then applicable, initially for lack of clarity, the second time for applying the interpretation given without considering evidence offered to show that the interpretation given unlawfully narrowed the scope of authorized service. *W. T. Mayfield Sons Trucking Co., Inc. v. United States et al.*, 211 F. Supp. 619 (1962), 234 F. Supp. 655 (1964). The Commission ultimately granted the application and the certificate here in question was accordingly issued. *W. T. Mayfield Sons Trucking Co. - Removal of Restriction*, 106 M.C.C. 892 (1968).

purportedly based its "interpretation" upon a finding as to the intention in granting the certificate. The Commission found "the vast majority of the shipments [stipulated] were unauthorized" and ordered Petitioner to cease and desist from all such operations.

Petitioner exhausted its administrative remedies before the Commission and sought review in the Fifth Circuit pursuant to the Judicial Review Act of 1950, 28 U.S.C. § 2341. The case was fully briefed by Petitioner and the Government (United States and the Commission) and a joint appendix was submitted to the court below.

Petitioner argued in its briefs before the Fifth Circuit, in sum:

1. that the Commission violated Section 212(a) of the Interstate Commerce Act by going behind the clear and unambiguous language of a certificate to narrow its scope;
2. that even if the Commission could lawfully go behind the language of the certificate, its "interpretation" was unlawful because it was based upon a rewriting of (a) the certificate, (b) its decisional background, and (c) the evidence supporting its grant; and
3. that the Commission's finding and order respecting the specific shipments in question and the lawful scope of Petitioner's future service was unclear, arbitrary and without any supporting evidence in material respects, placing future operations in jeopardy without definite guidelines.

In response, the Government did not seriously challenge Petitioner's claim that the Commission was barred from resorting to extraneous matters in the

absence of finding patent ambiguity in the language of a certificate. Further, the Government conceded that Petitioner's interpretation of the certificate "is a plausible one". (Gov't Brief, p. 20). However, the Government urged (Brief, p. 17):

> "Here, Mayfield's [Petitioner's] contention that the Commission did not find ambiguity in the Sub-No. 8 certificate rests upon an unreasonably narrow reading of the Commission's report and an unrealistic insistence that the Commission's choice of words be flawless. While it is quite true that the Commission did not actually use the word "ambiguous" in describing Mayfield's Sub-No. 8 certificate, there can be no doubt whatsoever that the Commission's decision to look beyond the face of the certificate was based upon the conclusion that the certificate itself was unclear, obscure, equivocal, enigmatic and ambiguous. Indeed, the word "unique" was used in that sense (footnote omitted)".

The Government then defended the Commission's interpretation and the cease and desist order, claiming that they had a rational basis and are sufficiently clear to enable Petitioner to confine its operations to the scope of the interpretation given.

Oral argument was expressly requested by both sides, Petitioner in its initial brief to the Court, and the Government by letter to the Clerk.[8] By letter from the

[8] The letter of the Government (Commission counsel), dated September 18, 1975, stated:

> "Subsequent to the filing of the Government's Brief in this matter, it occurs to me that I omitted any comment upon Petitioner's request that this case be set down for oral argument. The instant case continues a controversy which has persisted before the Commission and the Federal Courts for some sixteen years. I believe that oral argument will be of considerable assistance to the Court in finally resolving this matter, and therefore strongly concur in Petitioner's request."

Clerk, dated November 28, 1975, the parties were notified that a panel of the court had, pursuant to Rule 18 of the Fifth Circuit's Local Rules, transferred the case to the summary calendar for consideration without oral argument.

By decision, dated December 9, 1975, the Fifth Circuit affirmed *per curiam*, referring to the Court's Local Rule 21 (Appendix A, p. 2a, *infra*,). Petitioner timely sought rehearing, requesting, at a minimum, a statement of the grounds of decision. By order dated January 12, 1976, the petition for rehearing was denied. (Appendix A, p. 1a, *infra*).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's summary and unexplained affirmance of the Commission's decision and order raises anew a most important and delicate problem in the administration of federal appellate justice. The problem is that stated by Mr. Justice Brandeis, speaking for the Court nearly 50 years ago, in *Virginian Ry. Co. v. United States*, 272 U.S. 658, at 675 (1926):

> "Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. . . . The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal. And the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor."

The Court, again speaking through Mr. Justice Brandeis, repeated this criticism in *Cleveland, C.C. & St. L.R. Co. v. United States*, 275 U.S. 405, at 414-415 (1928), adding that the failure of the lower court to state the grounds of its decision subjects "both the litigants and this court" to unnecessary labor. See also *Arkansas Railroad Commission v. Chicago, R.I. & P.R. Co.*, 247 U.S. 597, at 603 (1927).

What makes the sentiments expressed in the *Virginian Ry.* and *Cleveland* cases so pertinent to the instant situation is the fact that in both those cases the Court was dealing with the failure of a three-judge district court, whose decision was directly appealable to this Court, to explicate its reasons for refusing to enjoin the enforcement of an order of the Interstate Commerce Commission. Courts of appeals have only recently taken over the function of the three-judge district courts in providing appellate review of Commission orders.[9] And so this Court's earlier admonitions to three-judge courts would now seem equally pertinent to the courts of appeals, whose decisions are directly reviewable by this Court on certiorari.

This case affords the first opportunity to determine if the courts of appeals, like their three-judge court

[9] At the time of the *Virginian Ry.* and *Cleveland* decisions and continuing until 1975, Commission orders were reviewable only by seeking injunctive relief from three-judge district courts pursuant to the Urgent Deficiencies Act, with direct appeals to this Court from the district court determinations. See 28 U.S.C. § 2325 (now repealed). But recent legislation (Public Law 93-584, 88 Stat. 1917), effective March 1, 1975, eliminated the use of three-judge district courts in the review of Commission orders. Such orders are now reviewable, as in this case, by courts of appeals pursuant to the Judicial Review Act of 1950, the Hobbs Act, 28 U.S.C. § 2341.

predecessors, should provide this Court and the litigants a written explanation of why they approve or affirm Commission orders, particularly where the affirmance could rest on any one of various alternative bases and each basis has a different certiorari potential.

The instant case, which is the first decision by the Fifth Circuit reviewing a Commission order, provides both a timely and appropriate vehicle for assessing the applicability to the courts of appeals of the written opinion requirement so forcefully articulated by Mr. Justice Brandeis. Here the litigants do not know what issues the Fifth Circuit has decided, and they cannot "determine whether the case presents a question worthy of consideration" by this Court. Nor can this Court assess the importance or the correctness – and thus the reviewability – of the rulings that are hidden under the summary affirmance. Consider briefly the possibilities of what underlies the Fifth Circuit's decision:

(1) Did the Fifth Circuit mean to say that the Commission is free to ignore the plain and unambiguous language of a lawfully issued certificate of public convenience and necessity and to narrow its scope at will? If so, the decision below presents a certiorari problem of obvious importance and magnitude, potentially affecting the tens of thousands of outstanding motor carrier certificates.

(2) Did the Fifth Circuit mean to say that the Commission is free to ignore the plain and unambiguous language of a lawfully issued certificate and to narrow its scope if it finds the certificate "unique"? If so, the decision below is without precedent and gives the Commission unlimited authority to narrow, through the interpretation process, countless certificates that are in some sense "unique".

(3) Did the Fifth Circuit mean to say that the mandate of Section 212(a) of the Interstate Commerce Act, 49 U.S.C. § 312(a), and this Court's decisions no longer require that the Commission find the language of a lawfully issued certificate ambiguous before resorting to its history and narrowing its scope? If so, the decision below presents profound problems respecting the Act as interpreted by this Court, problems that would fully warrant review on certiorari.

(4) Did the Fifth Circuit mean to adopt the Government's argument that when the Commission described the certificate as "unique" it really meant that the language was "ambiguous", thus making permissible resort to matters antecedent to certificate issuance and narrowing its scope? If so, the decision below raises certiorari problems as to when a reviewing court may affirm an agency's decision on grounds not invoked by the agency itself.

(5) Did the Fifth Circuit sustain the Commission's order on some other undisclosed basis? Was the decision premised on the erroneous notion that at stake here were mere matters of agency discretion or evidentiary support for the agency order?

The first four possible grounds for the unexplained affirmance by the Fifth Circuit would appear to be wholly improper and at a minimum to require some explanation. And if the Court did mean to adopt any one of those four grounds, each ground would involve a different certiorari question and different reasons why certiorari should be granted. The problem, in other words, is that Petitioner cannot determine which ground the Fifth Circuit utilized in its affirmance; nor can this Court determine whether there is a ground warranting review.

At the heart of any appellate consideration of the Commission's action in this case is the fact that a "certificate, when finally granted . . . , is not subject to revocation in whole or in part except as specifically authorized by Congress." *United States v. Seatrain Lines*, 329 U.S. 424, at 432-33 (1947). As stated by a three judge district court in reviewing a Commission interpretation of another of Petitioner's certificates:

> "'Operating authority issued by the Commission may only be limited, cancelled, or revoked pursuant to the provisions of Section 212(a) of the Interstate Commerce Act (Title 49 U.S. Code, § 312(a)). The Commission may not circumvent the requirements of Section 212(a) under the guise of 'interpreting' operating authority issued by it. See *Watson Brothers Transportation Company, Inc. v. United States, et al.*, 132 F. Supp. 905, aff'd. *per curiam*, 350 U.S. 927."[10]

Thus, the Commission is forbidden by statute from narrowing or limiting the scope of a certificate by resort to circumstances surrounding a grant of the authority in the absence of patent ambiguity in the meaning of the language of the certificate. As this Court stated in *Nelson, Inc. v. United States*, 355 U.S. 554, at 557 (1958):

> "The plain meaning of words in a commodity description [by the Commission] is controlling in the absence of ambiguity or specialized usage in the trade."

The Commission itself has heretofore consistently followed the *Nelson* rule of interpretation, to wit:

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[10] *W. T. Mayfield Sons Trucking Co. v. United States, supra*, 234 F. Supp. 655, at 660.

"The rules in question arose from the need to protect legitimate expectations based on Commission actions. In order to afford the certainty and continuity essential for both carriers and the shipping public in such an extensively regulated industry, reliance on the language of an operating certificate must not go unrequited. Accordingly, absent a patent ambiguity on the face of the document, the Commission will not permit reference to extraneous matters to show that the service apparently permitted by the terms of the certificate in fact exceeds the authority actually granted. *Andrew G. Nelson, Inc. v. United States, et al.*, 355 U.S. 554, 558 (1958)."[11]

The Commission failed to consider the meaning of the language of the certificate here in question. Instead, it immediately resorted to antecedent matters solely on finding the certificate "unique". In so doing, the Commission triggered at least one of the significant questions that might be involved in the decision below. Yet not even Government counsel could defend the Commission's use of the "uniqueness" rationale for resort to antecedent matters except by arguing that the finding of "uniqueness" was a finding of ambiguity in the language. That such a *post hoc* rationalization by appellate counsel, however, cannot be accepted by a reviewing court is firmly established by decisions of this Court. *Burlington Truck Lines v. United States*, 371 U.S. 156, at 168-9 (1962); *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, at 246

[11] *T. I. McCormack Trucking Co., Inc. v. United States*, 251 F. Supp. 526, at 530 (D.N.J., 1966), reversing *T. I. McCormack Trucking Co., Inc., Investigation and Revocation of Certificate*, 89 M.C.C. 5 (1962).

(1972); *Investment Company Institute v. Camp.*, 401 U.S. 617, at 628 (1971). Nevertheless the possibility remains that the Fifth Circuit did affirm the Commission's action on such a *post hoc* rationalization, contrary to this Court's decisions. Certainly there is no evidence to the contrary in the Fifth Circuit's summary disposition of this case.

Despite its intimate involvement in the proceeding below, Petitioner has no way of knowing which of the foregoing possibilities the Fifth Circuit had in mind when it issued its summary affirmance.[12] Not only is the Petitioner hobbled in trying to assess whether a petition for certiorari is justified, but the Fifth Circuit's terse affirmance precludes the formulation of a meaningful question for this Court's consideration. And this Court cannot assess the importance of the "cert-worthiness" of such a phantom question.

The problem here present is compounded by the great latitude that courts of appeals must have in the conduct of their judicial business. As this Court recognized in *Taylor v. McKeithen*, 407 U.S. 191, at 194, n. 4 (1972), "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions", a latitude that "is especially true with respect to summary affirmances". Moreover, as the dissent in *Taylor* emphasized, the Fifth Circuit in

[12] The Court below may have felt that the Commission's "interpretation" was correct irrespective of the errors of the Commission in its *ratio decidendi*. If so, of course, the same considerations barring acceptance of appellate counsel's *post hoc* rationalizations should have barred affirmance. *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, at 196 (1947).

particular has experienced the heaviest caseload of all the circuits and hence needs "the maximum possible latitude" in dealing with the ever-rising "flood tide" of appeals. 407 U.S., at 196.

Yet in the onrush of disposing of more and more appeals, certain points are reached where the duty to tell this Court and the litigants precisely what is being decided outweighs the appellate court's discretion as to when not to issue any opinion or explanation, however short.[13] One of those points was obviously reached in *Taylor v. McKeithen*, where the Fifth Circuit's summary order gave no clue as to whether a substantial federal question was involved, or only a ruling "of more limited importance". See also *Northcross v. Board of Education*, 412 U.S. 427 (1973), where the Sixth Circuit was ordered to state its reasons for denying costs and attorneys' fees under a federal statute; *Times-Mirror Co. v. Labor Board*, 331 U.S. 789 (1947), where the Ninth Circuit was ordered to make findings of fact in a Labor Board review proceeding, citing the *Virginian Ry.* case (272 U.S., at 675); see also *City of Hammond v. Schappi Bus Line*, 275 U.S. 164 (1927); *City of Hammond v. Farina Bus Line & Transportation Co.*, 275 U.S. 173 (1927).

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[13]The Fifth Circuit's Local Rule 21 became effective August 14, 1970. The percentage of all appeals disposed of under Rule 21 has grown steadily from 12.6% (210 of 1661 opinions) in 1971 to 38.6% (583 of 1510 opinions) during the first nine months of 1975. Volume II, 1975 Hearings, Commission on Revision of the Federal Court Appellate System, pp. 892-93. The number of cases decided by the Fifth Circuit without oral argument had reached 54.9% by 1974 (1028 of 1874 cases). *Ibid.*, at 883.

In an analogous situation, despite the heavy caseloads of the state courts, this Court has not hesitated to remand cases to those tribunals to clarify and explain whether they were deciding a federal constitutional question, or whether their decisions (summary or otherwise) were meant to rest on an adequate and independent nonfederal ground. See *California v. Krivda*, 409 U.S. 33 (1972); *Mental Hygiene Department v. Kirchner*, 380 U.S. 194 (1965); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939).

As in *Taylor*, the Fifth Circuit's summary affirmance here directed the parties' attention to that Court's Local Rule 21. Petitioner's petition for rehearing below asserted misapplication of criterion "(4)" of this Rule – "that no error of law appears; . . . ." The Fifth Circuit's summary rejection of the rehearing request in no way explained why criterion "(4)" was satisfied. Nor did that denial shed any light on the Fifth Circuit's reason for leaving the Commission's order untouched.

The instant case thus poses an important confrontation between (1) the right of this Court and of the litigants to know what has been decided by the lower appellate court, so that they can assess the reviewability of the decision, and (2) the discretion and latitude accorded such an appellate court to manage its ever-increasing caseload. It is a confrontation that arises in the peculiar context of appellate review of Interstate Commerce Commission orders, which has a history and significance all its own. This Court has never countenanced the failure of a three-judge district court to issue an opinion when such failure has created the dilemma first described in the *Virginian Ry.* case. Whether the order at issue before the three-judge

district court be that of the Commission or that of a state regulatory commission, "[t]his court has repeatedly adverted to the importance in a suit of this character of a statement by the district court of the grounds of its decision." *Railroad Commission of Wisconsin v. W.G. Maxcy*, 281 U.S. 82, at 83 (1930); see also *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, at 67-70 (1933); *J.F. Lawrence v. St. Louis-San Francisco Ry. Co.*, 274 U.S. 588, at 596 (1927). There is no indication in the legislative history of the recent transfer from the three-judge courts to the courts of appeals of jurisdiction to review Commission orders that Congress intended to alter or downgrade the importance of the reviewing court's statement of the grounds of its decision.

In the final analysis, this case presents a judicial dilemma only this Court can unravel. To excuse the Fifth Circuit from the task of explaining the grounds of its decision in this case would render judicial review at the court of appeals level meaningless. This Court is not equipped through the certiorari process to provide the explanation the Fifth Circuit failed to provide. Thus, unless this Court requires the Fifth Circuit to provide an articulated explanation of the grounds for its decision, there will be no meaningful judicial review of this Commission order as intended by Congress.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

The Court may wish to consider the advisability, at the time of granting the writ, of also vacating the judgment below and remanding the case to the Fifth Circuit for proceedings that would result in a written explanation of the reasons why the Commission's order should or should not be affirmed. See *Taylor v. McKeithen, supra*, 407 U.S., at 194.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2110

W. T. MAYFIELD SONS TRUCKING CO.,
Petitioner,

versus

UNITED STATES OF AMERICA, and the
INTERSTATE COMMERCE COMMISSION,
Respondents.

Petition for Review and to Set Aside
Orders of the Interstate Commerce Commission
(Georgia Case)

ON PETITION FOR REHEARING
(JANUARY 12, 1976)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2110
Summary Calendar*

W. T. MAYFIELD SONS TRUCKING CO.,
Petitioner,

v.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION TO REVIEW AND SET ASIDE ORDERS
OF THE INTERSTATE COMMERCE COMMISSION

(December 9, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.
PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

No. MC-C-7566

W. T. MAYFIELD SONS TRUCKING CO., INC.,–INVESTIGATION AND REVOCATION OF CERTIFICATES

Decided June 17, 1974

Upon investigation, respondent found to be conducting certain motor carrier operations not authorized by its certificates, in violation of section 206(a) of the Interstate Commerce Act. Cease and desist order entered.

Charles Ephraim and *R. J. Reynolds III* for respondent.
John J. Charuhas, J. Preston Proffitt, Jr., and *Stuart B. Robbins* for Bureau of Enforcement, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GRESHAM, AND O'NEAL

GRESHAM, *Commissioner:*

Exceptions to the initial decision and recommended order of the Administrative Law Judge were filed by respondent, and the Commission's Bureau of Enforcement (Bureau) replied.

By order entered August 12, 1971, an investigation under sections 204(c) and 212(a) of the Interstate Commerce Act was instituted, on the Commission's own motion, into the practices of W. T. Mayfield Sons Trucking Co., Inc. (Mayfield), with a view toward

determining whether said respondent has been and is engaged in the unauthorized transportation of property, in interstate or foreign commerce, in violation of section 206(a) of the statute, and to issuing such orders and taking such other and further action as the facts and circumstances may warrant. The Bureau was directed to participate as a party in the proceeding.

The evidence, the initial decision of the Administrative Law Judge, and the pleadings have been considered. The facts are stipulated, and the recitation thereof by the Administrative Law Judge is correct and will be adopted as our own. Those facts are summarized next below for clarity of discussion. [120 M.C.C. 47]

Respondent, an experienced motor common carrier of specified commodities, holds certificates Nos. MC-103926 and various subnumbers thereunder, authorizing it to engage in interstate motor common carrier operations in several States. The pertinent portion of Mayfield's authority reads as follows:

> No. MC-103926 (Sub-No. 8).
> Over Irregular Routes,
> Contractors' machinery and equipment, *not limited to such commodities as are intended solely for use by contractors,* [emphasis supplied]
> Between points in Georgia, on the one hand, and, on the other, points in Alabama, Florida, North Carolina, South Carolina, and Tennessee.

Respondent's certificate originally authorized the transportation of "contractors' machinery and equipment," a commodity description of the "intended use" type; however, after protracted litigation, before this Commission and the courts, the italicized language was added in *Mayfield Sons Trucking Co.–Removal of Restriction,* 106 M.C.C. 892 (1968). The principal issue in this proceeding is the interpretation and scope properly to

be accorded said authority. The facts, which are stipulated, reveal that between March 2 and May 21, 1971, Mayfield transported 19 shipments, consisting of a wide variety of commodities such as airplane parts, utility trucks, cargo trailers, refuse containers, cooling towers, air-conditioning units, radio outfits, household goods containers, and road rollers, to an equally diverse group of consignees, includning Federal, State, and local governmental agencies, transfer companies, trash disposal firms, electric power companies, hospitals, and contractors. The Administrative Law Judge's summary of these shipments is reproduced as appendix A hereto.

After reviewing the history of the involved authority, the Administrative Law Judge concluded:

> *** In substance, it is reasonable to conclude that the Sub-No. 8 authority, as it presently is described, was intended by the Commission to authorize Mayfield to transport commodities of the type generally used by contractors to persons other than contractors, as well as to contractors. Obviously, applicant did not seek, nor did the Commission intend to grant, an authority which would amount to a general commodity authorization. This means that the aforementioned type of commodities could be transported to military establishments, airports, and military and naval bases, but the authority still limits applicant to those commodities which are within the definition of contractors' machinery and equipment. Clearly, such commodities as air conditioning units, household goods containers, cooling towers (to mention just some of the shipments described in appendix A hereto) are not within the scope of applicant's authority and may not lawfully be transported by responndent. [120 M.C.C. 48]

He also determined that shipments of "self-propelled road rollers" were improperly transported under respondent's Sub-No. 14 certificate which authorizes the transportation of tractors (except truck tractors). He recommended that a cease and desist order be entered.

In its exceptions, respondent urges that the certificate in question (a) is clear and unamibiguous on its face, and that it was, accordingly, unnecessary and improper for the Administrative Law Judge to refer to matters antecedent to its issuance; (b) that by careful selection of language, the Commission intended clearly to indicate that the commodity description is not subject to an "an intended use" limitation; that service to contractor and noncontractor consignees is authorized; and that in both cases, the class of commodities that may be transported is the same, i.e., "machinery and equipment of the type which could be used by contractors and which are moved to or from jobsites";[1] (c) that the commodities stipulated to have been transported are, with two admitted exceptions, of that type; and (d) that the road rollers are "tractors" because they have the capability of pulling accessory implements or other road rollers. In its reply, the Bureau maintains that the findings and conclusions of the Administrative Law Judge are correct and should be affirmed.

[1] By the last condition, respondent does not mean that the items actually moved to or from a jobsite, but that "they are all of a type which move to and from jobs, i.e., are within the terms machinery and equipment."

DISCUSSION AND CONCLUSIONS

In *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586, 587 (1954), it was noted that from the earliest days of regulation, commodity descriptions have been framed in three principal ways: (a) by naming the commodities specifically, (b) by use of generic or class terms, and (c) by reference to intended future use. By the last method, the so-called "intended use" description, an otherwise broad and indeterminate generic term, such as "contractors' machinery and equipment," or "such commodities as are dealt in by retail department stores," is qualified with a requirement that the commodity must be intended for use by the particular class of user named therein. On the one hand, such a description is, from a commodity standpoint, very broad. "Contractors' materials and supplies" for example, cover any "materials" or "supplies" used in furtherance of the enterprise [120 M.C.C. 49] involved, including items that may have utility in many lines of work. It is not necessary that the shipment be *consigned* to a member of an authorized class; and a carrier operating under the description "contractors' machinery and equipment" may, under proper circumstances, transport a bulldozer to a distributor or dealer of construction equipment. As will presently be explained, the nature of the commodity and the identity of the consignee are primarily important in determining the extent of the carrier's affirmative duty to investigate the commodity's end use before it transports the shipment.

The evolution of "intended use" descriptions has been discussed in many other proceedings, including *W. T. Mayfield Sons Trucking Co.–Interpretations*, infra,

and need not be recounted in detail here. Suffice it to say that as more and more carriers expanded operations under this type of authority, and as their problems became known, the Commission, in *Point Pleasant Transp. Co., Inc., Declaratory Order,* 61 M.C.C. 666 (1953), undertook to ease somewhat their burden in predetermining the use of commodities tendered for shipment by enunciating a "rule of reasonableness" with respect to the required investigation. It held that a carrier operating under such a description may assume, unless it has knowledge to the contrary, that commodities *predominantly* used in, or *which have virtually no other use than in,* the particular activity referred to in its operating authority, are actually to be used in that activity; and that the carrier may transport all such commodities without making an investigation as to the actual ultimate end use. However, it is the *predominant* use of the *commodity* that governs, and not that of the generic class to which such article or commodity belongs. With respect to those commodities having general utility in order lines of work, it was pointed out that no absolute assumption can be indulged in by the carrier. It may transport such commodities only after they have in some way been earmarked for the use referred to in its authority (by being consigned to such a user, for instance) so that the carrier can reasonably be certain that such use at the time of the shipment is intended. In *Mitchell Bros. Truck Lines–Investigation,* 91 M.C.C. 267 (1962), it was further noted that when the carrier has notice, actual or constructive, that the commodity will not be used in the activity involved, then it must be established affirmatively that at the time of the movement it is, in fact, intended for use in that

activity. It was stated that, at the very least, investigation is required if it is apparent that a shipment is [120 M.C.C. 50] destined to a class or type of consignee not normally dealing in or using the commodities in question.

Respondent's Sub-No. 8 certificate is, to our knowledge, unique, and cannot properly be interpreted without recourse to the 14 years of litigation, four Commission reports, and two court decisions that preceded its issuance. The authority was originally granted to Mr. W. T. Mayfield, an individual, on October 25, 1946, and thereafter was transferred to the corporation, the respondent herein. At the time of its original issuance, the certificate simply authorized the transportation of "contractors' machinery and equipment." However, on June 18, 1959, Mayfield filed a petition with the Commission seeking to have the certificate interpreted to embrace "such commodities which are not intended for use by persons engaged in the contracting business." Thereafter, on July 13, 1959, Mayfield also filed an application for authority in No. MC-103926 (Sub-No. 9) seeking a certificate substantially similar to the manner in which it desired to have its Sub-No. 8 authority interpreted; and both proceedings were initially determined on a consolidated record in *W. T. Mayfield Sons Trucking Co.–Interpretations,* 84 M.C.C. 694 (1961). In its report, division 1 considered the history of applicant's operations (at page 696):

> ***Since issuance of the original authority, Mayfield and its predecessor have transported, in interstate commerce, machines and equipment for contractors and also for persons other than contractors. From June 1948 to December 1952,

the predecessor transported such commodities as road graders, bulldozers, cranes, engines, and similar equipment for the Federal Government. Admittedly none of these shipments were connected in any way with a contractor, and the articles transported are not intended for use by contractors. From December 1952 to August 1958 Mayfield performed similar transportation, handling about 240 shipments. It has continued to handle such traffic, and between June 1957 and November 1958 about 135 shipments of such commodities were handled for certain nongovernmental consignees other than contractors. *Assertedly, in all instances in which this transportation is performed the machines and equipment are used in the same manner as a contractor would use them and are the type of commodity usually used by a contractor in road work and building construction.* On at least 17 occasions, however, under this guise, applicant handled on Government bills of lading, tractors which are used to tow heavy artillery or to transport personnel, cargo, or ammunition. Applicant has discontinued transporting such tractors, however, conceding that they are not within the ambit of its authority. [Emphasis supplied.]

The division concluded that the Sub-No. 8 certificate authorized the transportation of such shipments only when intended for use by a contractor, that the services performed on behalf of the armed forces were not embraced therein, that modification of the [120 M.C.C. 51] certificate was not justified, and that the accompanying application should be denied.

However, in *W. T. Mayfield Sons Trucking Co. v. United States,* 211 F. Supp. 619 (N.D. Ga. 1962), the statutory three-judge district court held that the division's ultimate findings were vague and uncertain,

and remanded the proceeding for the formulation of precise guidelines. In *W. T. Mayfield Sons Trucking Co.–Interpretations,* 92 M.C.C. 167 (1963), the Commission again considered Mayfield's authority and, after an exhaustive discussion of the intended use description, concluded at pages 170-171:

> *** [W]e think it clear that Mayfield may transport equipment and machinery predominantly used by contractors when consigned to contractors, or distributors of, or dealers of these commodities, without investigation as to the ultimate use to be made of them, so long as it does not know or have some notice that the items being transported are likely to be used by someone other than a contractor. In the absence of such knowledge or notice, it is justified in assuming that such commodities ultimately will be used by contractors. On the other hand, if such knowledge or notice is present the carrier has the burden of acquiring knowledge of the actual intended user. For example, if the consignee is a branch of the Federal Government, such as the armed forces, or a County or State highway department, Mayfield would not be justified in assuming that a shipment is intended for use by a contractor, and it could not transport such a shipment *unless it established that at the time of movement the shipment actually was intended for the use of a private contractor rather than a Government agency.* [Emphasis supplied.] In this connection, it makes no difference that the consignee will use the machinery or equipment *as* a contractor would use them since the use intended at the time of shipment must be *by* a contractor. [Footnote omitted.]

Mayfield argues than it should be able to transport commodities "normally," as distinct from "predominantly," used by contractors with-

out investigation as to the actual intended use. To the extent the words quoted are different, and we think the former to be less constrictive, "predominantly" has found acceptance in the industry, and has we think, as used in the rule of reasonableness explained herein, proved to make that rule with respect to the requirement of knowledge or investigation, a workable one.

To summarize, petitioner's certificate heretofore issued herein, insofar as it authorizes the transportation of "contractors' machinery and equipment," authorizes the transportation of all forms of machinery and equipment which are, at the time of movement, without further processing or manufacturing, in a form and condition to be used by contractors, and which, (1) at the time of movement, are known by petitioner to be, or are ascertained by petitioner with reasonable certainty to be, intended for use by a contractor, or (2) are predominantly used by, or which have no, or virtually no, other use than by, contractors, without specific inquiry as to their intended future use, provided petitioner does not have knowledge or some notice of an intended use other than as just stated.

Mayfield again brought suit before the same court, which held in *W. T. Mayfield Sons Trucking Co. v. United States,* 234 F. Supp. [120 M.C.C. 52] 655 (N.D. Ga. 1964), that the Commission "has complied with the court's direction for clarification, that definite guidelines have now been established delineating the scope of Mayfield's authority and that the same is not ambiguous." *Ibid.*, at page 658. Nevetheless, the court again remanded the proceeding to the Commission, declaring that:

> This court feels that the Commission should have given consideration to the testimony showing the actual services rendered by Mayfield on or before October 25, 1946, under the certificate (citations omitted). The failure or refusal to do so deprived plaintiff of a full and fair hearing. (Citations omitted.) *W. T. Mayfield Sons Trucking Co. v. United States,* 234 F. Supp. 655 (N.D. Ga. 1964).

Accordingly, the proceedings were reopened and the Commission in its report on further hearing, in *W. T. Mayfield Sons Trucking Co.–Interpretation,* 103 M.C.C. 736 (1967), in part, noted that Mayfield had been granted two temporary authorities prior to the issuance of the Sub-No. 8 certificate, and that both grants had authorized the transportation of typical contractors' machinery and equipment not only to contractors, but also to "military and naval bases." Therefore, in the light of asserted operations under the temporary authorities, the Commission reopened the Sub-No. 9 application proceeding, which application as noted, had earlier been denied in 84 M.C.C. 694. Another hearing was held and the Administrative Law Judge recommended, division 1, in its decision in *Mayfield Sons Trucking Co.–Removal of Restriction,* 106 M.C.C. 892, discussed the evidence with respect to respondent's post-1946 operations (at pages 894-5):

> *** Subsequent to its obtaining permanent authority in 1946, applicant has transported commodities of the type used by contractors for various governmental bodies or nongovernmental consignees other than contractors. Approximately 240 governmental shipments were transported between December 1952 and August 1958. Nongovernmental shipments to persons other than contractors numbered 135 for the period between June 1957 and November 1958.

On further hearing in this application proceeding applicant has submitted exhibits showing the extent to which it has provided service under its mistaken interpretation to persons other than contractors or where the intended use of the commodities transported has not been known.***.

The exhibits note shipments of machinery and equipment of the type generally used by contractors throughout the involved territory. On the face of the respective bills which support the exhibits it is shown that the shipments usually move to numerous consignees who, on the record before us, are not contractors. Those named include Transportation Officer United States Government, Tuscaloosa County, Gulf States [120 M.C.C. 53] Paper Plant, Alabama Dry Dock and Shipbuilding, B. V. Hendrick Gravel & Sand Co., North Carolina State Highway Commission, Mobile Chemical Co., Consolidated Quarries, Georgia Marble Company, State Highway Department of Georgia, Southern Railway System, Hodges Sand & Soil Co., South Carolina Highway Department, and McCormick County Soil Conservation District.***.

As noted, the division granted the authority now under consideration.

We believe it is clear from the foregoing that in *Mayfield Sons Trucking Co.–Removal of Restriction, supra,* it was not intended that respondent's authority be completely freed from the intended use limitation. Its purpose rather was to enlarge the class of user to include noncontractors *when performing equivalent functions.* In the first place, the phrase, "contractors' machinery and equipment," while not without limits, is so inherently broad and ill defined as to be of little practical use as a generic description without reference to the commodity's intended future use. Moreover, because the phrase has always been considered to be

subject to the intended use limitation, the Commission has avoided the drawing of precise boundaries, in favor of a flexible interpretation designed to enable a broad service to the contractor. To create a generic description from a phrase inherently and historically unsuited to the task, inevitably would have resulted in confusion, uncertainty, and endless litigation, not only for respondent, but for all carriers operating under similar "contractors' machinery and equipment" descriptions. Secondly, throughout the course of the aforementioned litigation, the nature of respondent's past operations, which provided the basis for its present authority, had always been clear: during World War II, Mayfield's predecessor rendered extensive service to components of the armed forces responsible for military construction and, thereafter, respondent expanded its operations to include State and local governmental departments and, at a later date, private individuals, having occasion to perform construction activities. The first *Interpretations* case, *supra,* distinguished between those situations where the governmental department performed the construction with its own crews and equipment as an "in-house endeavor," and those where it engaged a private contractor to perform the work, holding that only in the latter case would a noncontractor be a proper consignee. The sole intention underlying the addition of the phrase "not limited to such commodities as are intended solely for use by contractors" was, in our judgment, to correct the omission of the first *Interpretations* case, and to authorize a service of the same [120 M.C.C. 54] scope provided for contractors to persons who are not contractors *when engaged in the performance of construction activities equivalent to those which a contractor performs.*

We also believe that the principles governing the interpretation of "intended use" descriptions generally, including the rule of reasonableness, must have been intended to apply to respondent's modified authority. In other words, when a shipment is known or ascertained with reasonable certainty to be intended for use on a construction project, respondent may transport to contractor and noncontractor consignees alike, any item used in the furtherance of such enterprise, so long as it falls within the terms "machinery" and "equipment." Moreover, under the rule of reasonableness enunciated in the *Point Pleasant* and *Mitchell* cases, *supra*, machinery and equipment "predominantly" used by contractors may be assumed to be intended for use in a construction activity, and may be transported without investigation, so long as respondent has no notice or knowledge to the contrary. Stated somewhat differently, because machinery or equipment "predominantly" used by contractors, by definition, has virtually no other use than in construction, the nature of the consignee is no longer of particular relevance in determining respondent's duty to investigate. However, respondent's present authority does not, any more than did its prior authority, authorize the transportation of machinery and equipment other than that predominantly used by contractors, unless it is affirmatively ascertained that the end use will be on a construction activity. Thus, an article of general or ambiguous usage, such as a radio unit, a pickup truck, or a hammer may be transported by respondent when it is consigned to a contractor or to a person other than a contractor only when respondent knows or has reasonably ascertained that the item will be employed on a construction activity, provided, of course, that item falls in the

category of "machinery" or "equipment." In other words, except in those cases where the item moves to or from a contractor, or to or from a jobsite and is thus "earmarked" for construction, the carrier has an affirmative duty to investigate a commodity's intended use before it transports the shipment. There is no support in any of the aforementioned decisions for respondent's contention that an item is authorized so long as it "is of a type which could be used by contractors and which is moved to or from jobs."

We agree with the Administrative Law Judge that the vast majority of the shipments listed on exhibit A were unauthorized. With the exception of the self-propelled road rollers involved in [120 M.C.C. 55] shipments 5 and 19, none of the remaining articles is of the type "predominantly" used by contractors. Indeed some of the commodities, namely, military jeeps, cooling towers, air-conditioning units, and aircraft parts, are of such a nature that it is difficult to see how they could possibly be employed on a construction activity as machinery or equipment.[2] The remaining items, utility and pickup trucks, communications equipment, cargo trailers, and refuse containers, could be employed on a construction activity; however, these items obviously have utility in other lines of work, and prior to their transportation to a noncontractor consignee, respondent was required to make an investigation as to their ultimate end use.

One matter remains for consideration. Respondent claims that the self-propelled road rollers involved in shipments 5 and 19 are embraced within the description "tractors (except truck tractors)" contained in its

[2] The terms contractors' "machinery" and "equipment" is distinguished from "contractors' materials" by the fact that the former are used by the contractor in his operations, while the latter materials go into the structure or other thing upon which the contractor works. *C & H Transp. Co., Inc., Interpretation of Certificate, supra,* at page 588, footnote 1.

certificate No. MC-103926 (Sub-No. 14), which is frequently joined with its Sub-No. 8 certificate to provide through transportation. It recognizes that road rollers were specifically held to be excluded from the definition of tractor in *Daily Exp., Inc.–Investigation of Operations,* 98 M.C.C. 661 (1965), but urges that these units are different in that they have the capability of towing other implements for road rolling purposes and are, to that extent, a "vehicle for drawing other implements" within the meaning of the cited decision. We disagree. The units involved here like those considered in the *Daily* proceeding. were designed for road rolling, and the additional towing capability is incidental to their primary purpose. They are not tractors. Cf. *Diamond Transp. System, Inc., Ext.–Tractors,* 113 M.C.C. 733, 741 (1971).

FINDINGS

We find that respondent W. T. Mayfield Sons Trucking Co., has been engaged in the transportation of various commodities, as described in this report, in interstate or foreign commerce, as a common carrier by motor vehicle, without appropriate authority in violation of section 206(a) of the Interstate Commerce Act; and that an order should be entered requiring respondent to cease and desist and thereafter to refrain and abstain from such unauthorized and unlawful operations until and unless appropriate authority is [120 M.C.C. 56] obtained; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX A

Item	Date Waybill No.	Consignor origin	Consignee destination	Commodity	Dimensions weight	Transportation charge
1	3-2-71 21029	Truck Equipment Co. of Ga., Atlanta, Ga.	Associated Containers, Charlotte, N.C.	Truckload of (12) refuse containers (5) 2 yd. containers (5) 6 " ----do--- (2) 8 " ----do---	 80"L x 40"W x 38"H; 480 lbs. ea. 80"L x 71"W x 63"H; 1,150 lbs. ea. 80"L x 71"W x 83"H; 1,232 lbs. ea. actual weight 10,614 lbs.	$178.00
2	3-3-71 21057	Transportation Officer, Supply Depot, Cherry Point, N.C.	Transportation Officer, Robins Air Force Base, Ga.	Airplane door assembly, aircraft parts n.o.i.	122" x 111" x 70" 850 lbs.	313.40
3	4-5-71 21874	Transportation Officer, Fort Benning, Ga.	*Stop off:* Receiving Officer, USAR Center, Greensboro, N.C. *Final:* Receiving Officer, USAR Center, Greenville, N.C.	Utility truck; 1/4 ton, jeep type vehicle. Cargo trailer; 1.5 ton, two-wheel trailer.	131"L x 63.5"W x 52.8"H; 2,380 lbs. 166"L x 83"W x 55" H; 2,670 lbs. Total–5,050 lbs.	355.60
4	4-8-71 22116	Supply Officer, USAR Training Center, Coral Gables, Fla.	Transportation Officer, USA Flight Training Center, Fort Stewart, Ga.	Four quarter ton cargo trailers. One Dodge pickup truck–3/4 ton.	108.5"L x 61.5"W x 44"H, all four trailers weigh total of-----2,320 lbs. 204"L x 82"W x 72"H–weight----4,075 lbs. Total 6,395 lbs.	294.00
5	4-7-71 22066	Stowe-Woodward Co., Griffin, Ga.	Alabama Kraft Co., Cottonton, Ala.	One iron roll (new cover other than w rn out). One box drive parts.	38" diam. x 282"L 41,000 lbs.	184.50
6	4-7-71 22028	Transportation Officer, Fort Bragg, N.C.	Transportation Officer, Fort Gordon, Ga.	Three military communications outfits in portable metal van-type personnel shelters, not on wheels, not self-propelled.	16,900 lbs.	194.00

18b

APPENDIX A—Continued

Item	Date Waybill No.	Consignor origin	Consignee destination	Commodity	Dimensions weight	Transportation charge
7	4-8-71 22110	Control Environment, Atlanta, Ga.	Control Environment, Raleigh, N.C.	Truckload of (7) 8 yd. refuse containers.	80"L x 71"W x 83"H, 1,232 lbs. ea. Total weight—8,624 lbs.	$242.00
8	4-8-71 22064	State Tractor Co., Montgomery, Ala.	Hammonds Asphalt Paving Co., Tallahassee, Fla.	One Galion 9-wheel self-propelled pneumatic tire roller.	9,500 lbs.	166.00
9	4-14-71 22241	E. D. Goodfellow Co., Memphis, Tenn.	*Stop off:* Scarbard Mechanical Piping Co., Fort Valley State College, Fort Valley, Ga.	Cooling tower	180"L x 94"W x 103"H weight 5,900 lbs.	414.00
			Final: Turner Murphey Co., Robins AFB, Ga.	-----do---------	180"L x 94"W x 109"H weight 6,000 lbs. Total weight, 11,900 lbs.	
10	4-14-71 22294	Control Environment Refuse Containers, Inc., Atlanta, Ga.	Control Environment Trash Disposal Co., Raleigh, N.C.	Truckload of (7) 8 yard refuse containers.	80"L x 71"W x 83"H, 1,232 lbs. ea. Total 8,624 lbs.	246.00
11	4-19-71 22404	E. D. Goodfellow Co., Inc., Memphis, Tenn.	*Stop off:* Walker County Branch Prison, c/o Mechanical Service Co., Rock Springs, Ga.	One cooling tower	144"L x 80"W x 104"H, 5,140 lbs.	558.00
			Stoff off: Atlanta Gas Light Co., c/o Copeland Gates Apts., Atlanta, Ga.	------do-------	88.5"L x 72"W x 106"H, 2,210 lbs.	
			Final: Archbold Memorial Hospital, Thomasville, Ga.	-------do------	144"L x 74"W x 104"H, 6,156 lbs. Total weight 13,506 lbs.	

APPENDIX A—Continued

Item	Date Waybill No.	Consignor origin	Consignee destination	Commodity	Dimensions weight	Transportation charge
12	4-21-71 22549	Temperature Control, Inc., Norcross, Ga.	Tiltz Air Conditioning Co., c/o W. T. Grant Store, Cocoa, Fla.	One air-conditioning unit.	19'2"L x 6'W x 6'1"H, 4,140 lbs.	$284.00
				---------do---------	10'8" x 3'4"W x 4'1"H, 1,570 lbs.	
13	4-22-71 21902	Temperature Control, Inc., Norcross, Ga.	Frank Cayce Co., c/o Harlee Quattlebaum Constr. Co., International Disposals Plant, Orangeburg, S.C.	---------do---------	13'8"L x 3'8"W x 4'8"H, 2,000 lbs.	178.00
				---------do---------	19'6"L x 7'8"W x 6'6"H, 5,700 lbs.	
					Total weight 7,799 lbs.	
14	4-22-71 21901	Temperature Control, Inc., Norcross, Ga.	Frank Cayce Co., c/o Harlee Quattlebaum Constr. Co., International Disposals Plant, Orangeburg, S.C.	---------do---------	19'6"L x 7'8"W x 6'6"H, 5,700 lbs.	178.00
15	4-23-71 21930	Orr Incorp., Gulfport, Miss.	Orr Inc., Atlanta, Ga.	One Galion tractor roller.	20,000 lbs.	258.00
16	4-27-71 23213	E. D. Goodfellow Co., Inc., Memphis, Tenn.	Compressor Service, c/o Clarkston High School, Clarkston, Ga.	One cooling tower	23'L x 8'4"W x 10'2"H, 9,800 lbs. lowboy required.	336.00
17	4-29-71 23367	Transportation Officer, Marine Corps. Supply Center, Albany, Ga.	Transportation Officer, Tractor Battalion Force Troops, U.S. Marine Corps. Reserve, Tampa, Fla.	Two radio outfits mounted on auto bodies.	133"L x 68"W x 67"H, 5,799 lbs. for all.	190.00
				Two pkgs. of spare parts.	548 lbs.	
					Total weight 6,248 lbs.	

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APPENDIX A—Continued

Item	Date Waybill No.	Consignor origin	Consignee destination	Commodity	Dimensions weight	Transportation charge
18	4-30-71 23358	Transportation Officer, Marine Corps. Supply Center, Albany, Ga.	Traffic Manager Officer, Marine Corps. Air Station, Cherry Point, N.C.	One 5-ton 6x6 truck wrecker.	346"L x 97"W x 115"H, 32,293 lbs.	$135.96
19	5-21-71 23197	(Richmond Export Packers) Burnham Van Service, Atlanta, Ga.	Sumpter Movers, Sumpter (sic), S.C.	Ten empty overseas household goods containers.	20,000 lbs.	198.00

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ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 17th day of June 1974.

No. MC-C-7566

W. T. MAYFIELD SONS TRUCKING CO., INC.,—INVESTIGATION AND REVOCATION OF CERTIFICATES

This proceeding having been duly instituted, and full investigation of the matters and things involved having been made, and the said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondent W. T. Mayfield Sons Trucking Co., Inc., be, and it is hereby, ordered and required to cease and desist and thereafter refrain and abstain from all operations, in interstate or foreign commerce, of the character found in said report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority for such operation is obtained, and that respondent is further required to comply with the provisions of rule 99 of the Commission's General Rules of Practice (40 CFR 1100.99).

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as August 16, 1974.

By the Commission, Division 1.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Supreme Court, U. S.
FILED
JUL 26 1976
MICHAEL RODAK, JR., CLERK

No. 75-1747

In the Supreme Court of the United States

OCTOBER TERM, 1976

W. T. MAYFIELD SONS TRUCKING CO., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals abused its discretion in affirming without opinion an order of the Interstate Commerce Commission interpreting a motor carrier's certificate of public convenience and necessity.

STATEMENT

In August 1971, the Interstate Commerce Commission instituted an investigation to determine whether petitioner was engaging in unauthorized transportation of property. The Commission found that certain shipments admittedly transported by petitioner were transported without appropriate authority (Pet. App. B). The Commis-

sion rejected petitioner's contention that its certificate of public convenience and necessity—authorizing the transportation of "[c]ontractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors" (Pet. App. 2b)—provided a basis for the operations. The Commission ordered petitioner to cease and desist from the unlawful operations (Pet. App. 25b).

Petitioner's original certificate, issued in 1946, authorized the transportation of "contractors' machinery and equipment" (Pet. App. 2b).[1] Petitioner's efforts to eliminate entirely the "intended use" restriction in its certificate led to 14 years of administrative and judicial litigation—recounted in detail in the Commission's report in the present proceeding (Pet. App. 7b-12b)—and culminated in an expansion of the original authority to include "[c]ontractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors."

In the present proceeding, both the administrative law judge and the Commission rejected the carrier's contention that the expanded certificate was no longer subject to any "intended use" restriction. Instead, the Commission found that the expanded certificate merely enlarged the

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[1]Commodity descriptions in motor carrier certificates identify the specific commodity to be transported, the generic classification involved, or the commodity's future intended use. *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586, 587. A certificate covering "contractors' machinery and equipment," an "intended use" description, authorizes transportation only of such machinery and equipment as is intended for use by a contractor. However, a carrier operating under such a certificate need not ascertain the actual intended use of all machinery and equipment it proposes to transport; in the absence of knowledge or notice to the contrary, the carrier may presume that machinery and equipment predominantly used by contractors is intended for use by a contractor. *Point Pleasant Transp. Co., Inc., Declaratory Order*, 61 M.C.C. 666.

class of users to include "persons who are not contractors *when engaged in the performance of construction activities equivalent to those which a contractor performs*" (Pet. App. 13b; emphasis in original).

On petition for review, the court of appeals affirmed the Commission's order without opinion, pursuant to its Local Rule 21.[2]

ARGUMENT

Petitioner's sole contention is that the court of appeals improperly disposed of the petition for review without a written opinion containing "an articulated explanation of the grounds for its decision" (Pet. 20). As this Court has stated, however, "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions," and "[t]hat is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the

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[2]Local Rule 21 provides:

Rule 21. Affirmance Without Opinion.

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F. 2d 966.

Fifth Circuit." *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4.[3]

The court of appeals did not abuse its broad discretion in affirming the Commission's order in this case without opinion. The key disputed issue before the Commission was the proper interpretation of that portion of petitioner's certificate that authorizes transportation of "[c]ontractors' machinery and equipment, not limited to such commodities as are intended solely for use by contractors" (Pet. App. 2b). The administrative law judge found that the certificate on its face was novel and ambiguous because it seemed both to suggest and to reject application of the "intended use test." He therefore resorted to the history of the certificate to determine its proper interpretation.[4]

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[3]The local rules of seven of the circuits now provide for the issuance of orders summarily affirming decisions of the district courts and administrative agencies. The Fifth Circuit adopted its Rule 21 after reviewing the "spectacular" increases in caseload in recent years and after concluding that it had a duty to fashion new methods or modify older ones "to at least stay abreast of this flood tide." *National Labor Relations Board* v. *Amalgamated Clothing Workers of America*, 430 F. 2d 966, 968, 970 (C.A. 5). The number of cases in the Fifth Circuit has continued to increase greatly. See *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts 1975*, p. 331. This increase parallels the continuing growth in the amount of federal appellate litigation, which is up 12.4 percent from last year and is at record levels. *1976 Semi-Annual Report of the Director, Administrative Office of the United States Courts*, p. 1. Not surprisingly, the courts of appeals have decided an increasing proportion of cases without written opinions. *1975 Annual Report of the Director, Administrative Office of the United States Courts*, pp. XI-21, XI-22.

[4]*W. T. Mayfield Sons Trucking Co., Inc.*, I.C.C. Docket No. MC-C 7566, Report and Order of Administrative Law Judge, p. 4:

> The Administrative Law Judge is unaware of a grant of authority made to any other carrier such as the description in respondent's Sub-No. 8 certificate. The description in the Sub-No. 8 application lends itself to some confusion since it initially grants authority which is and has been coupled with the intended use test and then, to some extent, eliminates the intended use test with the final phrase of the grant. The authority presently held was granted only after extensive litigation extending over a period of several years. In view of the uncertainty and ambiguity in the description, it is worthwhile to consider the derivation and history to learn the Commission's intention in granting the Sub-No. 8 authority.

The Commission agreed with the administrative law judge—it described the ambiguous certificate as "unique"—and likewise resorted for interpretation to the history of the certificate, concluding that it conferred "intended use" authority (Pet. App. 7b).

The petition for review of the Commission's order presented the court of appeals with the most routine of cases. It is settled that the Commission's interpretation of its own certificates is entitled to great deference and is not to be overturned unless found to be arbitrary, capricious, or clearly erroneous. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 177-178; *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. It is equally clear that the Commission may go behind the face of an ambiguous certificate and examine the record on which it was issued in order to determine what authority was granted. Here, too, a court will not reverse the Commission's determination unless its interpretation of the ambiguous certificate is arbitrary or clearly wrong. *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503 (S.D. N.Y.), affirmed, 324 U.S. 824; *Byers Transportation Co., Inc.* v. *United States*, 310 F. Supp. 1120 (W.D. Mo.).

The Commission acted responsibly in looking behind the face of petitioner's confusing certificate, and its interpretation is in complete accord with the certificate's history. Thus, the court of appeals quite properly viewed the case as appropriate for summary disposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1976.

DOJ-1976-07

Supreme Court, U.S.
FILED
JUL 30 1976

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1767

W. T. MAYFIELD SONS TRUCKING CO.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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July 30, 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1747

W. T. MAYFIELD SONS TRUCKING CO.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

The Government's Brief in Opposition, in its effort to reclassify this as "the most routine of cases," has dramatically underscored the appropriateness of granting certiorari to consider the sole Question Presented in the Petition – whether this case should be remanded to the Fifth Circuit for an explanation of its summary affirmance of the Interstate Commerce Commission order here involved.

The Government advances no tenable theory for the Fifth Circuit's precipitous action. It merely asserts that the court treated the appeal from the Commission's order as "the most routine of cases." But there is no citable evidence that the Fifth Circuit so treated the appeal; the court certainly did not say that the appeal was "routine", much less frivolous. And if it was so routine, why did the Government below urge the Fifth Circuit to set the matter for oral argument? (Pet. 10, n. 8). How can the highly contested culmination of what the Government calls "14 years of administrative and judicial litigation" (Opp. Br. 2) be called a "most routine case"?

Just as it did in its brief before the Fifth Circuit, the Government here first abandons and then restructures the Commission's decision to make it appear to be a common garden variety of an agency's interpretation of one of its own certificates. And from that restructuring, Government counsel now allege that the Fifth Circuit's affirmance of that restructured decision must have been a routine matter.

But, as demonstrated in the Petition, pp. 8, 16, the Commission's decision will not support such after-the-fact restructuring. While the administrative law judge did purport to find the certificate ambiguous on its face, so as to justify resort to the certificate's history for interpretative purposes, the Government in this Court makes the critical error of implying (Opp. Br. 5) that the "Commission agreed with the administrative law judge" that the certificate on its face was "ambiguous."* The Commission simply did not agree as

*The critical sentence in the Brief in Opposition appears at the top of page 5: "The Commission agreed with the administrative law judge - it described the ambiguous certificate

(continued)

to that critical legal conclusion. The term "ambiguous" is a word of art in the world of interpreting Commission certificates; that "ambiguous" concept has generated a prolific if not "routine" jurisprudence for interpreting and reinterpreting Commission certificates. Such interpretations are precisely the kind of "routine" administrative acts to which the courts give great deference (Opp. Br. 5). See Pet. 6-8.

The Commission, however, did not here find that petitioner's certificate was "ambiguous" on its face, as the administrative law judge had done. Rather, the Commission found the certificate "unique," and the Commission turned to the certificate's history to interpret a certificate that was merely "unique" or one-of-a-kind without seeming ambiguity. (Pet. App. 7b).

From that novel and unprecedented action of the Commission springs a series of statutory and legal problems, many of them anything but "routine." In no other case has the Commission ever resorted to a certificate's history without first having found it "ambiguous." In no other case has the Commission given any significance to the "uniqueness" of a certificate, particularly as a basis for historical reinterpretation.

(continued from proceeding page)

as 'unique' - and likewise resorted for interpretation to the history of the certificate . . ."

This is an artfully drawn sentence. It does not literally say that the law judge found the certificate "unique" or that the Commission agreed with his judgment that it was "ambiguous." But to the quick reader it leaves the impression that the Commission agreed that the ambiguous certificate was unique, or that the Commission described it as both ambiguous and unique.

What, then, is the basis of the Fifth Circuit's affirmance? Did it treat the Commission's decision as a novel and important extension of the "ambiguity" concept? Did it reinterpret the decision, as Government counsel then urged and still urge, into a routine application of the "ambiguity" doctrine? Did the Fifth Circuit mean to say that administrative decisions are to be reviewed on some basis other than what was articulated by the agency?

Significantly, the Government's brief in this Court does not answer any of those questions. Nor does it address itself to the critical and the only problem raised in the Petition. When no answers are given, or can be given, to the foregoing questions, how can this Court or the parties determine whether the enigmatic action of the Fifth Circuit creates any issue worthy of review on certiorari?

In short, the Government's Brief in Opposition is but another *post hoc* rationalization of the Commission's decision. It therefore offers no satisfactory reason why this case should not be remanded to the Fifth Circuit for an explication of the reasons for affirming the Commission's novel but dubious decision.

Respectfully submitted,

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